BRIGHTSIDE MECHANICAL & ELECTRICAL SERVICES GROUP LTD. & ANOR.

v.

HYUNDAI ENGINEERING & CONSTRUCTION CO. LTD.

HIGH COURT, SINGAPORE
LP THEAN J
[SUIT NO. 1130 OF 1987]
8 JANUARY 1988

CIVIL PROCEDURE: *Order 14 RSC - Summary Judgment - Whether acknowledgment that sum due and payable - Whether main contractor liable to sub-contractor for work done - Building owner withholding payment - Question of set-off - Whether equivalent to payment - Interpretation of clause of contract - Construction of clause provisional or prima facie - Point of law raised - Whether triable issue - Leave to defend - Construction of words "receipt of the sum" - Whether stay should be granted and matter referred to arbitration.*

The plaintiffs were sub-contractors of the defendants in respect of certain construction works at Marina Centre. Under Clause 11(a) of the sub-contract the defendants were obliged from time to time to make application to the Architect for certificates of payment that fairly represent the total value of the works, materials or goods executed or supplied by the plaintiffs. Under Clause 11(b) within 5 days of receipt of the said certificate the defendants were to pay to the plaintiffs the amount so stated less (i) retention money, (ii) any sums to which the defendants may be entitled in respect of delay in the completion of the sub-contract works and (iii) the amount previously paid.

The defendants by their certificate of payment No. 52 certified the amount due to the plaintiffs, after appropriate adjustments, was $924,711. However, the defendants declined to pay the said sum. The plaintiffs applied for summary judgment. The defendant raised two issues:

(a) the defendants are not liable under Clause 11(b) of the sub-contract to pay the amount to the plaintiffs as they, the defendants, have not received from the building owner the sum included in the Architect's certificate No. S 59.

(b) the defendants are entitled to be indemnified by the plaintiffs in respect of loss or damage suffered by the defendants arising from the late completion by the plaintiffs of the sub-contract work and are entitled to set off against the plaintiff's claim their cross-claim for damages.

Held:

[1] The effect of Clause 11(b) is that until the defendants receive the sum claimed by the plaintiffs, the defendants are not obliged to pay it to the plaintiffs and this is the construction of Clause 11(b) and is, *prima facie*, a defence to the claim; the amount is therefore not indisputably due and payable to the plaintiffs.

[2] The construction of the material words in Clause 11(b) can only be regarded as a provisional one or a *prima facie* one as plainly at this stage, the Court should not express a definitive view which would bind either party or prejudice their positions when the claim comes on for adjudication.

[3] The plaintiffs are clearly not entitled to judgment in view of the point of law raised by the defendants, i.e., the construction of Clause 11(b) of the sub-contract. That point is not 'bad' and is highly arguable and the matter must be referred to arbitration.

[Appeals dismissed with costs.]

Cases referered to:
Hong Kong Teakwood Works Ltd. v. Shui On Construction Co. Ltd. [1984] HKLR 235
Schindler Lifts v. Shui On Construction [1984] HKLR 340
Ribblesdale & Ors. v. Forbes [1916] LT 483
Jaya Kumar v. Subramanian Mohana Krishnan & Anor. [1987] 2 MLJ 432
Verral v. Great Yarmouth Borough Council [1981] QB 202
European Asian Bank A.G. v. Punjab & Sind Bank (No. 2) [1983] 1 WLR 642
S.L. Sethia Liners Ltd. v. Strate Trading Corporation of India [1985] 1 WLR 1398

Legislation referred to:
Arbitration Act (Cap 10) [Sing], s. 7
Business Registration Act [Sing], s. 17(1)

For the plaintiffs - Giam Chin Toon
For the defendants - Naresh Mahtani (Caby Toh with him)

JUDGMENT

LP Thean J:

These are two appeals by the plaintiffs against the two orders respectively of the Assistant Registrar made on 4 August 1987 on the following applications: summons-in-chambers No. 3228 of 1987 by the plaintiffs for final judgment for the amount claimed against the defendants under O. 14 of the Rules of Supreme Court and summons-in-chambers No. 3264 of 1987 by the defendants for a stay of the plaintiffs' action and all further proceedings under s. 7 of the Arbitration Act (Cap. 10, 1985 edn.). Both the applications were heard together by the learned Assistant Registrar, and at the conclusion thereof he allowed the defendants' application and made no order on the plaintiffs' application.

By an agreement in writing dated 15 September 1982 ("the Main Contract"), the defendants were engaged by Marina Centre Holdings Pte. Ltd. ("the Owner") as the main contractor for the construction of a huge development, called Marina Centre, on the land known as URA Land Parcels 83, 84, 85 and 86, Singapore. The plaintiffs are the sub-contractors of the defendants in respect of mechnical works at the Marina Centre. The sub-contract was initially made between the defendants and Carl P. Wallace International, Inc. ("Carl Wallace") by two documents dated 16 September 1982 and 10 August 1983 ("the Sub-Contract"), but subsequently by an agreement in writing made on 13 August 1985, the plaintiffs assumed the obligations, and took over the rights, of Carl Wallace and become a sub-contractor of the defendants.

Under Clause 11(a) of the Sub-contract, the defendants are obliged, subject to and in accordance with the Main Contract, from time to time make application to the architect in charge of the development for certificates of payment and for the inclusion therein of the amounts which at the date thereof fairly represent the total value of the works, materials or goods executed or supplied by the plaintiffs that may be included therein under that Clause. On such application being made the architect will and subject to the terms of the Main Contract issue a certificate of payment and direct the defendants as to the total value of works, materials or goods executed or supplied by the plaintiffs included in the calculation of the amount stated as due in such certificate and inform the plaintiffs in writing of the amount of such total value. Under Clause 11(b) of the sub-contract, the defendants shall within five days of receipt of the sum included in any certificate of the architect notify and pay to the plaintiffs the total value certified in the certificate of the architect less: (i) retention money, (ii) any sums to which the defendants may be entitled in respect of delay in the completion of the sub-contract works and (iii) the amount previously paid.

Pursuant to the provisions of the Main Contract, the architect on 12 March 1987 issued a Certificate No. S. 59 in the sum of $5,063,173, and a sum of $1,698,297 was included therein as the total value of the sub-contract works executed by the plaintiffs. In consequence of the architect's certificate, the defendants by their certificate for payment No. 52 dated 20 March, 1987 certified to the plaintiffs that, after deduction by the defendants of the retention money, "contra charges", the amounts previously paid and the balance of the advanced payments made, the amount due to the plaintiffs is $924,711. Nothwithstanding the issue of this certificate of payment, the defendants declined to pay to the plaintiffs the amount of $924,711 or any part thereof and the reason for their refusal to pay is this. On 2 February 1987 the architect issued to the Owner a certificate under Clause 22 of the Main Contract in the following terms:

> The original completion date for the above Works was specified in the Appendix to the Conditions of Contract as 23 March 1985. In accordance with Clause 23 of the Conditions of Contract, Hyundai Engineering and Construction Co Limited have been granted reasonable extensions of time for the completion of the said Works which have had the effect of extending the Date for Completion of the Works from 23 March 1985 until 6 February 1986.
>
> I hereby certify pursuant to Clause 22 of the Conditions of Contract that in my opinion the Works ought reasonably to have been completed by 6 February 1986 that is by the extended time for completion fixed under Clause 23 of the Conditions of Contract.

Arising from that certificate ("Clause 22 Certificate"), the Owner by a letter of 29 March 1987 notified the defendants that, on the basis of the Clause 22 Certificate, the Owner had decided to exercise its right under the said Clause 22, and that the sum of $5,063,173, being the amount certified in Certificate No. S. 59, and all future certified payments would be retained to set off against liquidated and ascertained damages payable to the Owner, which were assessed to be in the sum of approximately $62,000,000. The letter is in the following terms:

> Your letter HD-SIMA-2325 dated 18 March 1987 on the above subject refers.
>
> The Architect has certified under Clause 22 of the Contract Conditions on 2 February 1987 (a copy of which was copied to you) that in his opinion the Works should have been completed by 6 February 1986. Acting on this certification MCH has now decided to exercise its right under the same Clause 22 whereby the Employer may deduct any monies: due or become due to the Contractor under this Contract to set off against payment to the employer as liquidated and ascertained damages for the period during which the Works have remained incomplete, or may recover the same as a debt from the Contractor.
>
> The current certificate for payment No. 59 amounting to a sum of S$5,063,173 as well as all future certified payments will therefore be retained to set off against the liquidated and ascertained damages payable to the Employer. The current assessment of liquidated and ascertained damages due to the Employer are assessed at approximately S$62 million.

Following that letter from the Owner, the defendants wrote on 13 April 1987 to the plaintiffs as follows:

> Further to our letter to you of 23 March 1987, you are aware that MCH have now withheld payment of the sums payable under interim certificate number 59, and have indicated that all further sums so certified in interim payment certificates will be withheld by way of set-off, in respect of their purported entitlement to recover liquidated and ascertained damages pursuant to the certificate contained in JPA's letter dated 2 February 1987 to MCH.
>
> Whilst we do not accept the validity of the Clause 22 certificate, or MCH's entitlement to deduct liquidated damages, you will appreciate that we have incurred loss and damage as a result of MCH's reliance on JPA's certificate.

> We must in these circumstances therefore reserve our rights to recover from you the loss and damage which we have incurred, and may in future incur, as a result of delays which you are responsible for causing in completion of your sub-contract works.

Accordingly, no payment of the sum of $924,711 or any part thereof was made to the plaintiffs.

The plaintiffs therefore brought this action to recover the amount of $924,711. Their case is simply this: there is really no dispute that the amount claimed is due and payable by the defendants. The defendants have acknowledged that and issued a certificate of payment for this sum and therefore judgment for this amount should be entered against the defendants upon an application under O. 14. In defence, the defendants raise two main issues:

(a) the defendants are not liable under Clause 11(b) of the Sub-Contract to pay the amount to the plaintiffs as they, the defendants, have not received from the Owner the sum included in the architect's certificate No. S. 59;

(b) the defendants are entitled to be indemnified by the plaintiffs in respect of loss or damage suffered by the defendants arising from the late completion by the plaintiffs of the sub-contract work and are entitled to set off against the plaintiffs' claim their cross-claim for damages,

The first issue turns on the true construction of Clause 11(b) of the Sub-contract and it is convenient at this stage to set out in full the provision of this Clause:

> 11(b) Within five days of the receipt by the Contractor of the sum included in any certificate of the Architect the Contractor shall notify and pay to the Sub-Contractor the total value certified therein in respect of the Sub-Contract Works and in respect of any authorised variations thereof and in respect of any amounts ascertained under Clause 8(c) hereof less:
>
> (i) Retention Money, that is to say the proportion attributable to the Sub-Contract Works of the amount retained by the Employer in accordance with the Main Contract and at the rate specified in Part IV of the Appendix to this Sub-Contract;
>
> (ii) Number not used.
>
> (iii) Any sum to which the Contractor may be entitled in respect of delay in the completion of the Sub-Contract Works or any section thereof; and
>
> (iv) The amounts previously paid.

An authority - albeit a persuasive authority - directly in point is the case in Hong Kong of *Hong Kong Teakwood Works Ltd. v. Shui On Construction Co. Ltd.* [1984] HKLR 235 in which the facts are somewhat similar to the case before me. There, the plaintiff, a sub-contractor, claimed against the defendant, the main contractor, the amount due under two certificates of payment. The sub-contract between the plaintiff and the defendant also had a Clause 11(b) which, so far as material, is in the following terms:

> Within 14 days of the receipt by the main contractor of payment from the employer against any certificate from the architect, the main contractor shall notify and pay to the sub-contractor the total value certified therein.

The defendant refused to pay the amount certified as due to the plaintiff, on the ground that the building owner had failed to pay to the defendant the amount certified; the building owner had, in exercise of the right under the main contract, set off against the amount certified its claim or liquidated damages. The plaintiff applied for summary judgment under O. 14 and the defendant applied for a stay. Hunter J held, *inter alia*, that giving the words "receipt of payment" their normal meaning they meant receipt of money. He said, at p. 237:

> ... Now the material words are "receipt of payment". I think that I must give those words their normal meaning. To me their normal meaning is receipt of actual payment, receipt of money. This seems to me to accord with the other phrases that one finds in these contracts "Pay or allow" is one in the main contract, para. 22, which is followed by the words "the employer may deduct such sum from any monies due". I think that all these words contemplate a simple piece of arithmetic, and that the *prima facie* meaning of receipt of payment is receipt of money.

He was, however, not prepared to put a final construction on these words at that juncture - being an O. 14 stage. He said, at pp. 237 to 238:

> I have been invited on this application to apply the principles in *European Asian Bank v. Punjab and Sind Bank* [1983] 2 All ER 508 and construe this contract on the basis that this is a point of construction which should be determined at this stage. I do not agree. There are some contracts which it is perfectly proper for the Court to construe under O. 14. There are other contracts where in my opinion at least, slightly more mature reflection and mature consideration is necessary. I have in mind the phrase "detailed argument and mature considerations" used by Lord Diplock in *American Cyanamid v. Ethlcon* [1975] AC 396, 407. I think that a building contract of this complexity is one. There are a great many documents, I have no doubt, which are in fact incorporated in this contract which I have never yet seen. Not only has a Court in due course got to consider this sub-contract, it has also got to put it in the context of the main contract.
>
> So I am not purporting at this moment to put any final construction upon this contract which remotely binds either party or any future adjudicator. It is quite unnecessary to do so. For the plaintiffs to succeed here, they have to satisfy me that the construction for which they contend is really the only construction, the right construction of this contract. For the reasons I have already given I cannot accept that. I think the more probable construction is the natural meaning of the words that I have indicated, and I think that is the more probable construction in this particular Clause which deals with interim provision. Now whether in fact on mature reflection that is proved to be right, or whether that construction also governs 11(c) and 11(g) is not a matter with which I am concerned at this juncture. I think therefore for this purpose it is sufficient for me to say: my *prima facie* construction of this clause is adverse to the plaintiffs' interest and that is sufficient to dispose of this appeal. But since the matter will probably go further and someone might want to know what I would have done on the other issues I will make some comments upon them.

Pausing here, I do not think that any valid criticism could be made against Hunter J for not expressing a final and definitive view on the construction of the clause in question. Taking the view as he did, he had to express it as a "*prima facie*" view so as not to bind "either party or any future adjudicator" at the hearing of the matter in dispute, whether such hearing be before an arbitrator or the Court. On the basis of the view he took the resulting order he made was an interlocutory order which, of course, did not dispose of the matter in dispute finally. If his view on the construction were that as contended by the plaintiff then probably he could put a final construction on the clause and dispose of the matter finally, i.e. made a final order.

About three months after the decision of Hunter J a similar case involving the same main contractor as a defendant came before another Judge, Power J in the High Court in Hong Kong: *Schindler Lifts v. Shui On Construction* [1984] HKLR 340. There, the lift and escalator sub-contractor issued a writ against the main contractor claiming for the amount due under two certificates of payment. There was also a Clause 11(b) in the sub-contractor between the plaintiff and the defendant, and the main contractor refused payment on the same ground, i.e. no payment had been received from the building owner who had exercised its right to set-off for liquidated damages under the main contract. The plaintiff applied for judgment

under O. 14 and the defendant applied for a stay. Both the applications were heard and Power J held that the point involved was clear cut and thus it was proper for him to decide it at O. 14 stage and he held that "payment" in Clause 11(b) was wide enough to include a deduction made under Clause 22 of the main contract. He said, at p. 346:

> The point involved in this application, although a short one, is not without difficulty. I am satisfied, however, that the present applicant has raised a clear cut issue, that full argument has been addressed to the Court and that the only result of my not deciding will be that the case will go for trial and that the argument will be rehearsed all over again before a Judge with the possibility of another appeal. Such being the case, I am satisfied, following the decision in the *European Asian Bank's* case [1983] 2 All ER 508, that I should decide the matter in this hearing. I am satisfied that the meaning of the word "payment" in Clause 1(b) is wide enough to include a deduction made under Clause 22 of the main contract. I am satisfied that once a formally correct architect's statement has been issued under Clause 22, no challenge can be made thereto until after practical completion. I am satisfied, therefore, that in the present case, the defendant did receive a payment within the meaning of that term as is used in Clause 11(b) and that he failed within 14 days to pay the sub-contractor the amount which is now being claimed against him. There must, therefore, be judgment for the plaintiff in that amount.

On appeal, his decision was reversed. The Court of Appeal in Hong Kong set aside the judgment and ordered a stay: [1985] HKLR 118. The Court of Appeal supported the decision of Hunter J and refrained from deciding the point of construction of Clause 11(b). McMullin V.P. in the course of the judgment, said at p. 124:

> While we do not purport to decide the point of construction, we nevertheless think it proper to comment that we incline to the view of Clause 11(b) taken by Hunter J.

I now turn to Clause 11(b) of the Sub-contract. It is significant to note that the material part of Clause 11(b) of the Sub-contract, namely: "Within five days of the **receipt** by the Contractor **of the sum included in any certificate of the Architect** the Contractor shall... pay..." is slightly different from, and, in my view, more explicit than, the corresponding part of Clause 11(b) of the sub-contract in *Hong Kong Teakwood* case which is as follows:

> Within 14 days of **receipt** by the main contractor **of payment from the employer against any certificate** from the architect, the main contractor shall... pay...

(The underlines of the words in the clauses are inserted for the purpose of emphasis).

The words are to me clear and unambiguous and effect must be given to them; giving them the ordinary or normal meaning, they contemplate actual receipt by the main contractor of the sum included in the certificate. So construed, the effect of Clause 11(b) is that until the defendants receive the sum claimed by the plaintiffs, the defendants are not obliged to pay it to the plaintiffs. This is the construction of Clause 11(b) as urged on behalf of the defendants and is, *prima facie*, a defence to the claim; the amount is therefore not indisputably due and payable to the plaintiffs.

In this case, there was no actual receipt by the defendants of the amount certified by the architect. What the Owner, in effect, did, as seen from its letter of 29 March 1987, was to retain the amount certified and all future certified payments to set off against the liquidated and ascertained damages payable to it by the defendants. There is authority to say that a set-off is not equivalent to payment: see *Ribblesdale Ors. v. Forbes* [1916] LT 483. However, it is argued on behalf of the plaintiffs that as between the defendants and the Owner, the defendants had received the amount certified in Certificate No. S. 59. The Owner in exercise of its rights under Clause 22 of the Main Contract had deducted this amount and applied it

towards payment of liquidated damages which the defendants would otherwise be liable to pay. Instead of actually paying the amount of liquidated damages the defendant had by contract agreed with the Owner that the latter may deduct the same from the amount payable to the defendants, and that precisely was what the Owner did. The defendants therefore had received the amount certified. Such a construction would entail giving to the term "receipt of the sum" an extended meaning. For the present purpose, I am not inclined to say that such a construction should, in the context of the contractual arrangements between the plaintiffs and the defendants and between the defendants and the Owner, be accepted.

Like, Hunter J in *Hong Kong Teakwood* case, the view I hold on the construction of the material words in Clause 11(b) of the Sub-contract can only be regarded as a provisional one, or in the words of Hunter J a *prima facie* one. This obviously must be so, because as a consequence of the view I take the order which I shall have to make is an interlocutory one, and the same point of construction in this case may arise later- whether before a Judge or an arbitrator - for consideration; plainly at this stage I should not express a definitive view which would bind either party or prejudice their positions when the claim comes on for adjudication.

In the course of the argument before me I was reminded by Counsel for the plaintiffs that in *Jaya Kumar v. Subramaniam Mohana Krishnan and Anor.* [1987] 2 MLJ 432 I held that where an issue raised in an O. 14 application is one of law and is clear cut it should be disposed of rather than let it go for trial. I still remain firmly of the view that that is correct; but clearly that must be understood in the context of the point in issue before me in that case. I held there that as a matter of construction of s. 17(1) of the Business Registration Act that section did not apply to the contract in question and disabled the plaintiff from successfully claiming the amount due. That, of course, was a point of law involved and a resolution thereof resulted in a final judgment. That precisely also was what the Courts did in the two cases referred to in my judgment, namely: *Verrall v. Great Yarmouth Borough Council* [1981] QB 202 and *European Asian Bank A.G. v. Punjab & Sind Bank* (No. 2.) [1983] 1 WLR 642. In the first case, the plaintiff claimed for specific performance of a contractual licence of a hall and Watkin J held on a point of law that specific performance could be given in such a claim and he granted specific performance, thus disposing of the matter finally before him. That was upheld on appeal by the Court of Appeal. In the second case, the plaintiffs claimed a sum due under a letter of credit and the Court of Appeal disposed of certain points of law involved and gave final judgment against the defendants.

The approach, to be adopted in dealing with a point of law raised in an O. 14 application was considered again by the Court of Appeal in England in a very recent case: *S.L. Sethia Liners Ltd. v. State Trading Corporation of India* [1985] 1 WLR 1398. In that case, a buyer bought a consignment of sugar F.O.B. a West Coast port of India from a seller under a sale contract which provided, *inter alia*, that despatch and demurrage at the port of loading should be for the seller's account and that all disputes be referred to arbitration. The buyers sued the seller claiming demurrage, which claim was resisted by the sellers on the ground that their obligation was to indemnify the buyers in respect of demurrage which they had incurred in relation to sub-sale. The buyers applied for judgment under O. 14 and the sellers applied for a stay under the Arbitration Act. It was held by the the Court of Appeal that since the construction of the demurrage term was a difficult and arguable matter the seller should have leave to defend and there should be a stay under the Arbitration Act. Kerr LJ in his judgment (with which the other two members of the Court agreed) said at pp. 1401 - 1402:

> ... If a point of law is raised on behalf of the defendants, which the Court feels able to consider without reference to contested facts simply on the submissions of the parties, then it is now settled that in applications for summary judgment under O. 14 the Court will do so in order to see whether there is any substance in the proposed defence. If it concludes that, although arguable, the point is bad, then it will give judgment for the plaintiffs. This course will also be adopted where there is a counter-application for a stay of the action. If the contract between the parties contains an arbitration clause to which s. 1 of the Act of 1975 applies, then the Court is not thereby precluded from considering whether there is any arguable defence to the plaintiffs' claim. If the Court concludes that the plaintiffs are clearly right in law then it will still give judgment for the plaintiffs. In the same breath, as it were, it will then have decided that in reality there was not in fact any dispute between the parties. If the Court is satisfied that the plaintiffs are clearly right in law, and that the defendants have no arguable defence, then it will not avail the defendants to have raised a point of law which the Court can see is in fact bad. In those circumstances the defendants cannot be heard to say that there was a dispute to be referred to arbitration. But if the Court concludes that the plaintiffs are not clearly entitled to judgment because the case raises problems which should be argued and considered fully, then it will give leave to defend, and it is therefore then bound to refer the matter to arbitration under s. 1 of the Act of 1975.
>
> I should add, for the sake of completeness, that in relation to applications for summary judgment which raise a bare issue of law, the parties may of course agree to ask the Court to decide this as a preliminary, or as the only, issue in the action. But if they do not do so and the Court does not consider that the plaintiff is entitled to summary judgment, then the Court should not investigate a clearly arguable defence by going further in order to decide whether the defendant's contention is in fact correct, and then given leave to defend. That course was emphatically rejected by this Court in *Pinemain Ltd. v. Welbeck International Ltd*. [1984] 129 SJ 66: Court of Appeal (Civil Division) Transcript No. 363 of 1984. The proper course, if the Court considers that the plaintiff is not or may not be right, is simply to give leave to defend, and accordingly, in cases where there is an arbitration clause, to refer the whole dispute to arbitration.

I respectfully adopt the principles stated by Kerr LJ which are wholly applicable here. I have come to the conclusion that the plaintiffs are clearly not entitled to judgment in view of the point of law raised by the defendants, i.e. the construction of Clause 11(b) of the Sub-contract. That point is not "bad" and is highly arguable. Judgment therefore cannot be given to the plaintiffs. There is a point in dispute and the matter must be referred to arbitration.

Having reached that conclusion, I find it unnecessary to consider the second issue and other points raised by the defendants in the appeals.

I dismiss the appeals with costs.

Also found at [1988] 1 CLJ 714